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State v. Gandenberger Respondent's Brief Dckt. 39557

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MICHAEL A. GANDENBERGER, Defendant-Appellant.	)	NO. 39557 RESPONDENT'S BRIEF

STATEMENT OF THE CASE

Nature of the Case

Michael A. Gandenberger appeals from the district court's order revoking his probation and executing his sentence.

Statement of Facts and Course of Proceedings

In 2005, Gandenberger was convicted of lewd and lascivious conduct with a child

under sixteen for conduct involving his seven-year-old niece. (6/20/05 PSI, pp.1-2; State's Exhibit 2.) The district court granted a withheld judgment and placed Gandenberger on probation for four years. (State's Exhibit 2.) In 2010, Gandenberger was convicted of failing to register as a sex offender and of a misdemeanor violation of I.C. §18-8329 for living at a residence within 500 feet of a school. (12/9/10 PSI, pp.1-2; R., pp.149-158.) On the felony charge, the district court imposed a unified five-year sentence with one year fixed, but suspended the sentence and placed Gandenberger on supervised probation for five years. (R., pp.149-158.)

In 2011, Gandenberger told a law enforcement officer that he sexually touched a three-year-old relative who was sleeping inside the house during a barbeque. (R., p.173; 11/22/11 Tr., p.16, L.15 – p.17, L.4.) The state filed a report of probation violation, alleging that Gandenberger violated his probation by committing a new crime, and by initiating, maintaining, or establishing conduct with a minor without the presence of an approved supervisor. (R., pp.173-175.)

At the subsequent evidentiary hearing, Gandenberger argued that his admission to the law enforcement officer was the product of a delusion brought about by his condition of paranoid schizophrenia. (12/6/11 Tr., p.12, L.11 – p.13, L.21.) Gandenberger presented testimony from a psychiatric mental health nurse practitioner who discussed Gandenberger's mental illness. (11/22/11 Tr., p.39, L.9 – p.48, L.16.) He also presented testimony from two adult relatives who were present at the barbeque, and who both testified that Gandenberger had no opportunity to be alone with his alleged victim there. (11/22/11 Tr., p.49, L.18 – p.59, L.12; 12/6/11 Tr., p.4, L.3 – p.10,

L.18.)

The district court concluded that the state failed to prove by a preponderance of evidence that Gandenberger violated his probation by committing a new offense by abusing a minor. (12/6/11 Tr., p.20, L.20 – p.22, L.6.) However, the court also concluded that the state proved Gandenberger violated his probation by initiating, maintaining, or establishing conduct with minors present at the barbeque without the presence of an approved supervisor. (12/6/11 Tr., p.17, L.9 – p.19, L.16.) The district court revoked Gandenberger's probation and executed the original unified sentence of five years with one year fixed. (R., pp.188-192.) Gandenberger timely appealed. (R., pp.193-196.)

ISSUE

Gandenberger states the issue on appeal as:

> Whether, absent any substantial and competent evidence to support a finding that Mr. Gandenberger willfully violated the terms of his probation, the district court's decision to revoke Mr. Gandenberger's probation was in error.

(Appellant's brief, p. 6.)

The state rephrases the issue as:

Has Gandenberger failed to show that the district court erred in revoking his probation and executing his sentence?

ARGUMENT

Gandenberger Has Failed To Show That The District Court Erred In Revoking His Probation And Executing His Sentence

A. Introduction

Gandenberger asserts that the district court erred by revoking his probation. (Appellant's brief, pp.7-19.) Specifically, Gandenberger contends that I.C.R. 33(e), which was amended in 2012 to require courts to find a willful probation violation before revoking probation, applied retroactively to his 2011 probation violation hearings. (Id.) Gandenberger contends that the district court violated this rule by revoking his probation without finding a willful violation. (Id.) In the alternative, Gandenberger contends that even if the newly amended I.C.R. 33(e) did not apply retroactively to his probation hearings, the district court erred by failing to consider alternatives to incarceration before revoking probation. (Id.)

Gandenberger's argument fails because the amended I.C.R. 33(e) is a procedural court rule enacted and amended by the Idaho Supreme Court, that does not apply retroactively to hearings conducted before the amendment became effective. Further, substantial evidence in the record exists to show that Gandeberger's probation violation was willful, and in any event, the district court considered several alternatives to incarceration before revoking Gandenberger's probation.

B. Standard Of Review

The decision to revoke probation is reviewed for an abuse of discretion. State v. Sanchez, 149 Idaho 102, 105, 233 P.3d 33, 36 (2009) (citing State v. Lafferty, 125 Idaho 378, 381, 870 P.2d 1337, 1340 (Ct. App. 1994)).

This Court will not substitute its view for that of the trier of fact as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. State v. Flowers, 131 Idaho 205, 207, 953 P.2d 645, 647 (Ct. App. 1988).

C. Idaho Criminal Rule 33(e), As Newly Amended, Does Not Apply Retroactively To Prior Probation Violation Hearings

At the time of the 2011 probation violation hearings in the present case, I.C.R. 33(e) read as follows:

> The court shall not revoke probation except after hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.

I.C.R. 33(e), 2011; see also 2/9/12 Idaho Supreme Court Order, "In Re: Amendments of Idaho Criminal Rules (I.C.R.) 6.6, 16, 25(a), 33, 41(a), 43 and 54.1[1]."

In 2012, the Idaho Supreme Court amended I.C.R. 33(e) to include the following sentence: "The court shall not revoke probation unless there is an admission by the defendant or a finding by the court, following a hearing, that the defendant willfully violated a condition of probation." (2/9/12 Idaho Supreme Court Order.) The Court

[1] For the Court's convenience, a copy of the Idaho Supreme Court's February 9, 2012 order amending I.C.R. 33 is attached hereto as Appendix A.

specifically ordered that the amendment become effective July 1, 2012. (Id.)

Citing Schriro v. Summerlin, 542 U.S. 348, 352-353 (2004), and Rhoades v. State, 149 Idaho 130, 139, 233 P.3d 61, 70 (2010), Gandenberger asserts that the amended I.C.R. 33(e) is a "new substantive rule" that applies retroactively to his 2011 probation hearings, and that the district court thus violated I.C.R. 33(e) by revoking his probation and executing the original sentence without finding a willful violation. (Appellant's brief, pp.15-17.) Gandenberger is incorrect.

In Schriro, the United States Supreme Court discussed the retroactive application of "new rules" resulting from opinions of that Court. Schriro, 542 at 351-358 (holding that the "new rule" from Ring v. Arizona, 536 U.S. 584 (2002), that statutory aggravators that make a defendant eligible for the death penalty must be decided by a jury, is not subject to retroactive application); see also Teague v. Lane, 489 U.S. 288, 292-316 (1989) (setting forth the relevant retroactivity criteria for new procedural and substantive rules resulting from opinions of the United States Supreme Court). In Rhoades, the Idaho Supreme Court adopted the "Teague approach" when determining whether decisions of the United States Supreme Court and the appellate courts of Idaho should be given retroactive effect in Idaho. Rhoades, 149 Idaho at 135-139, 233 P.3d at 66-70.

None of these cases address the retroactivity of procedural[2] criminal rules

[2] Contrary to Gandenberger's contention, I.C.R. 33(e) and the Idaho Criminal Rules are procedural, by virtue of the Idaho Supreme Court's inherent authority under which they are promulgated. See State v. Beam, 121 Idaho 862, 863, 541, 828 P.2d 891, 892 (1992) ("A careful reading of the Constitution of the State of Idaho and the legislature's codification of the Idaho Supreme Court's rule making power, reveals that this Court's rule making power goes to *procedural,* as opposed to *substantive,* rules.") (emphasis in original).

enacted and amended by the Idaho Supreme Court through its inherent authority. Cf. State v. Castro, 145 Idaho 173, 175, 177 P.3d 387, 389 (2008) ("The inherent power of the Idaho Supreme Court to make rules governing procedure in all the courts of Idaho, including the formulation of rules of criminal practice and procedure, has long been recognized" (citations omitted)). In this instance, the Idaho Supreme Court utilized its inherent authority to amend I.C.R. 33(e), and to order the amendment effective as of July 1, 2012. (2/9/12 Idaho Supreme Court Order.) The amended rule did not apply to hearings prior to the effective date established by the Idaho Supreme Court, including Gandenberger's 2011 probation violation hearings.

Gandenberger has failed to show that the 2012 amendment to I.C.R. 33(e) applied retroactively to his 2011 probation violation hearings. He has likewise failed to show that the district court erred in failing to apply an amended rule which had not yet become effective.

D. The District Court Acted Well Within Its Discretion In Revoking Gandenberger's Probation And Executing The Original Sentence

A trial court has discretion to revoke probation if any of the terms and conditions of the probation have been violated. I.C. §§ 19-2603, 20-222; State v. Beckett, 122 Idaho 324, 325, 834 P.2d 326, 327 (Ct. App. 1992); State v. Adams, 115 Idaho 1053, 1054, 772 P.2d 260, 261 (Ct. App. 1989).

"If a knowing and intentional probation violation has been proved, a district court's decision to revoke probation will be reviewed for an abuse of discretion." Sanchez, 149 Idaho at 105, 233 P.3d at 36 (quoting State v. Leach, 135 Idaho 525,

529, 20 P.3d 709, 713 (Ct. App. 2001)). If, however, the violation "was not willful, or was beyond the probationer's control, a court may not revoke probation and order imprisonment without first considering alternative methods to address the violation." Leach, 135 Idaho at 529, 20 P.3d at 713.

Contrary to Gandenberger's assertions on appeal, a review of the record and the applicable law supports the district court's determination that Gandenber's violation was willful, and reveals that the district court considered alternatives to incarceration prior to revoking Gandeberger's probation and executing the original sentence.

1. The State Presented Substantial Evidence That Gandenberger's Probation Violation Was Willful

When considering whether a probation violation was willful, the Idaho appellate courts review the record to determine whether substantial evidence exists to show a willful violation. See, e.g., State v. Knutsen, 138 Idaho 918, 923, 71 P.3d 1065, 1070 (Ct. App. 2003); Leach, 135 Idaho at 530-31, 20 P.3d at 714-15; Lafferty, 125 Idaho at 381, 870 P.2d at 1340.

Term 3 of Gandenberger's Sexual Offender Agreement of Supervision required that Gandenberger not "initiate, maintain, or establish contact with any person, male or female, under the age of 18 years, without the presence of an approved supervisor. The supervisor must be over the age of 21 and be approved by both [Gandenberger's] supervising officer and therapist." (State's Exhibit 5.) At the evidentiary hearing, Gandenberger's probation officer explained that under this standard sex offender term of probation, a potential "supervisor" meets with the probation officer and therapist and

undergoes a background check prior to "approval." (11/22/11 Tr., p.31, L.11 – p.32, L.16.) The probation officer also testified that Gandenberger had no approved supervisors, and therefore was entirely prohibited from initiating, maintaining, or establishing contact with any person, male or female, under the age of 18 years. (11/22/11 Tr., p.27, L.6 – p.28, L.5; p.32, L.17 – p.34, L.3.)

The district court concluded that Gandenberger violated this term of probation. (12/6/11 Tr., p.17, L.9 – p.19, L.16.) At the disposition hearing, the court stated that the violation was "clearly, in my view, a willful violation."[3] (12/20/11 Tr., p.34, L.24 – p.35, L.5.) There is substantial evidence in the record to support the district court's conclusion.

At the evidentiary hearing, Gandenberger's step-father, who lived with Gandenberger and was present at the barbeque, indicated that he was unaware of the "approval" requirement for supervisors, and that he instead understood Term 3 of Gandenberger's Sexual Offender Agreement of Supervision to permit Gandenberger to have contact with minors as long as he was supervised by any adult. (12/6/11 Tr., p.4, L.3 – p.5, L.5; p.9, L.1 – p.10, L.13.) Gandenberger did not testify at the evidentiary hearing and did not present evidence regarding his own understanding of Term 3. On

[3] On appeal, Gandenberger contends that the district court did not expressly find that the absence of an approved supervisor at the barbeque was "willful." (Appellant's brief, pp.8-10.) Such a distinction is of no import to the issue on appeal. When a district court finds that a defendant has violated his probation, unless the district court explicitly states otherwise, the presumption is that the violation was willful. See State v. Peterson, 123 Idaho 49, 844 P.2d 31 (Ct. App. 1992) (noting the district court "implicitly determined that Peterson's disregard of the reporting obligation was willful"). In this case, the district court expressly concluded that the violation as a whole was willful, and at worst, implicitly determined that the absence of an approved supervisor at the barbeque was willful as well.

appeal, as at the evidentiary hearing, Gandenberger argues that he misunderstood Term 3 of his Sexual Offender Agreement of Supervision, and that this misunderstanding rendered his violation "unwillful." (12/6/11 Tr., p.13, Ls.1-7; Appellant's brief, pp.7-15.)

In analyzing whether a probation violation is "willful," or "beyond the probationer's control," the Idaho Court of Appeals has considered whether the probationer correctly understood a probationary term. See Leach, 135 Idaho at 530-531, 20 P.3d at 714-715.[4] However, the Idaho Court of Appeals has also held that such correct understanding of a probationary term could be established by a probationer's acknowledgment of the term prior to the commencement of probation. See State v. Fife, 114 Idaho 103, 105-106, 753 P.2d 839, 841-842 (Ct. App. 1988).

In this case, the state presented evidence that Gandenberger acknowledged Term 3 of his Sexual Offender Agreement of Supervision. The state admitted into evidence the agreement itself, which contained Gandenberger's initials next to Term 3, as well as his full signature at the bottom of the agreement. (12/6/11 Tr., p.1, L.23 –

[4] Idaho Code § 18-101(1) provides that the term "willfully," "when applied to the intent with which an act is done or omitted," "implies simply a purpose or willingness to commit the act or make the omission referred to" and "does not require any intent to violate the law, or to injure another, or to acquire any advantage." This definition would indicate that a probationer's correct understanding of his probationary terms is not relevant to a determination of whether the violation is "willful." However, Leach provides that a court may not revoke probation and order imprisonment without first considering alternative methods to address the violation if *either* a violation "was not willful," or if the violation was "beyond the probationer's control." Leach, 135 Idaho at 529, 20 P.3d 709 at 713. A probation violation may be beyond a probationer's control, if, for example, the term is modified without probationer being so notified. In this case, the state asserts that evidence that Gandenberger was notified of his probation conditions, and that he acknowledged the condition at issue in this case, preclude his claim that the violation was "beyond his control."

p.2, L.9; State's Exhibit 5.) The state also admitted an Idaho Department of Correction Sex Offender In-Office Report, on which Gandenberger answered affirmatively that he had "reviewed [his] Court order(s) and/or parole agreement and all signed IDOC documents" since being placed on probation. (12/6/11 Tr., p.1, L.23 – p.2, L.7; State's Exhibit 6.) In addition, Term 3 of the agreement was clear, and there was no ambiguity as to the requirement that any supervisor be "approved." (State's Exhibit 5.)

Further, there is substantial evidence in the record that Gandenberger's contact with minors at the barbeque was willful. Gandenberger told a law enforcement officer that he was present at the barbeque with his cousin's minor daughter. (11/22/11 Tr., p.16, Ls.15-20.) Gandenberger's adult cousin testified that her two minor children attended the barbeque, and that they interacted with Gandenberger at these events. (11/22/11 Tr., p.50, L.9 – p.57, L.2.) Gandenberger's step-father testified that Gandenberger was outside during these barbeques, where he "kind of chases [the children] around a little bit or plays tag and stuff like that." (12/6/11 Tr., p.5, Ls.6-22; p.8, Ls.22-25.)

The record reveals that substantial evidence was presented at the evidentiary hearing to show that Gandenberger acknowledged and understood Term 3 of his Sexual Offender Agreement of Supervision, and that he willfully violated this term by initiating, maintaining, or establishing contact with minors. The record thus supports the district court's finding that Gandenberger's probation violation was willful.

2. The District Court Considered Alternatives To Incarceration

Even if this Court determines there is not substantial evidence to support the district court's finding that Gandenberger's probation violation was willful, this does not compel the conclusion that the district court erred in revoking Gandenberger's probation. Prior to the 2012 amendment of I.C.R. 33(e), a district court could revoke probation for a violation that was not willful if it "determine[d] that alternatives to imprisonment [were] not adequate in a particular situation to meet the state's legitimate interest in punishment, deterrence, or the protection of society." Sanchez, 149 Idaho at 106, 233 P.3d at 37 (quoting Leach, 135 Idaho at 529, 20 P.3d at 713).

In this case, the district court considered alternatives to revocation and imprisonment. At the conclusion of the evidentiary hearings, the district court stated that it wished for the probation officer to testify and provide recommendations at the disposition hearing. (12/6/11 Tr., p.22, L.20 – p.23, L.23.) At the disposition hearing, the probation officer expressed his concern for the difficulty involved with supervising a probationer who could have delusions about violating his probation. (12/20/11 Tr., p.4, Ls.5-15; p.5, L.20 – p.6, L.8.) Specifically, the probation officer testified that if Gandenberger was "having a hard time differentiating what's real and not real, that can be very dangerous, I think." (12/20/11 Tr., p.6, Ls.6-8.) The probation officer also expressed concern about Gandenberger's living situation, in that Gandenberger had been living with a relative who apparently was not familiar with Gandenberger's terms of supervision and was hosting barbeques where children were present. (12/20/11 Tr., p.4, L.17 – p.5, L.2.)

In asking that Gandenberger be placed back on probation, Gandenberger's counsel referenced a letter from Gandenberger's psychiatric mental health nurse practitioner, written prior to the evidentiary hearings, which recommended that Gandenberger be "[p]laced in an assisted living/group living environment/certified family home," "have a legal guardian," and "attend outpatient treatment to include: medication management, day treatment and chronic symptom management treatment." (12/20/11 Tr., p.29, L.8 – p. 32, L.18; Defendant's Exhibit A.) However, Gandenberger's counsel did not provide any specific information or plan regarding any particular alternative living arrangement or outpatient treatment. Further, Gandenberger's step-father acknowledged at the disposition hearing that he had made no progress in establishing himself as Gandenberger's legal guardian in the previous 10 months since he first considered that possibility, and that he had not yet looked into any type of alternative living arrangement for Gandenberger. (12/20/11 Tr., p.18, L.3 – p.19, L.17.)

The district court recognized its discretion to revoke or continue probation. (12/20/11 Tr., p.33, L.25 – p.34, L.11.) The court then expressly discussed the disposition alternatives. (12/20/11 Tr., p.35, L.18 – p.38, L.12.) The court was appropriately unwilling to continue the status quo of Gandenberger's residency status with his step-father in light of evidence that Gandenberger's family "didn't appreciate the significance" of Gandenberger's terms of probation. (12/20/11 Tr., p.35, L.23 – p.36, L.5.) The district court then considered the alternative disposition recommended by Gandenberger's psychiatric mental health nurse practitioner, but recognized that it had been presented no specific alternative residency options or treatment program.

(12/20/11 Tr., p.36, L.16 – p.37, L.20.) Finally, after stating that it had reviewed Gandenberger's PSI and criminal record, the court recognized that there was a "public safety risk here." (12/20/11 Tr., p.37, L.21 – p.38, L.7.) The court concluded that "the best alternative" was to revoke probation, impose the sentence, and order mental health treatment pursuant to I.C. § 19-2523. (12/20/11 Tr., p.38, Ls.13-17.)

The district court considered all of the relevant information, including alternatives to incarceration, and reasonably determined that Gandenberger was no longer an appropriate candidate for community supervision. Gandenberger has failed to establish an abuse of discretion.

DATED this 9th day of January 2013.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order revoking probation and ordering his sentence executed.

/s/
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 18th day of December, 2012, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/
MARK W. OLSON
Deputy Attorney General

MWO/pm

In the Supreme Court of the State of Idaho

IN RE: AMENDMENTS OF IDAHO CRIMINAL RULES (I.C.R.) 6.6, 16, 25(a), 33, 41(a), 43 and 54.1

ORDER

The Court having reviewed the recommendations approved by the Criminal Rules Advisory Committee and the Administrative Conference to amend Idaho Criminal Rules, and the Court having fully considered the same;

NOW, THEREFORE, IT IS HEREBY ORDERED that the Idaho Criminal Rules as they appear in the volume published by the Idaho Code Commission be, and they are hereby, amended as follows:

1. That Rule 6.6 be, and the same is hereby, amended to read as follows:

Rule 6.6 Indictment.

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(e) **Return of no bill.** If the grand jury concludes that probable cause is lacking and no indictment shall be returned, that fact shall be placed in writing and maintained under seal by the court as part of the record of that proceeding.

2. That Rule 16 be, and the same is hereby, amended to read as follows:

Rule 16. Discovery and inspection.

***

(d) **Redacting protected information from responses to discovery.** The party providing discovery may redact protected information from the information or material provided.

(1) Protected information means:

A. Contact information. The home addresses, business addresses, telephone numbers (including cell phones), and email addresses of an alleged victim, or of a witness, or of the spouse, children, or other close family members of the alleged victim or witness, and the places where any of such persons regularly go, such as schools and places of employment and worship.

B. Personal identifying information. The dates of birth and social security numbers of any persons other than the defendant.

C. Private information. Personal identification numbers (PINs), passwords, financial account numbers, information relating to financial transaction cards, and medical information protected by federal law that is not directly related to the crime charged.

(2) A prosecuting attorney who redacts protected information shall follow the following procedure:

A. If the defendant is represented by counsel, the prosecuting attorney shall serve defendant's counsel with a redacted copy of the discovery printed on white paper simultaneously with an unredacted copy of the discovery printed on paper of a color that is clearly distinguishable from white. The defendant's attorney, including appellate counsel, shall not disclose the protected information to the defendant or to a member of the defendant's family without the consent of the prosecuting attorney or an order of the court upon a showing of need.

B. If the defendant is not represented by counsel, the prosecuting attorney shall serve the defendant with a redacted copy of the discovery and, within seven (7) days of doing so, even if the disclosure was not in response to a discovery request, shall file with the court and serve upon the defendant a motion for a protective order with respect to the redacted information.

(3) A defense attorney or defendant who redacts protected information shall serve the prosecuting attorney with a redacted copy of the discovery printed on white paper simultaneously with an unredacted copy of the discovery printed on paper of a color that is clearly distinguishable from white. The state's attorney, including appellate counsel, shall not disclose the protected information to the alleged victim or to a member of the alleged victim's family without the consent of the defendant or an order of the court upon a showing of need.

(~~d~~e) **Failure to make written request, waiver.**

***

3. That Rule 25(a) be, and the same is hereby, amended to read as follows:

Rule 25. Disqualification of judge.

(a) **Disqualification of judge without cause.** In all criminal actions, except actions before drug courts or mental health courts, the parties shall each have the right to one disqualification without cause of the judge or magistrate, except as herein provided, under the following conditions and procedures:

***

(6) **Alternate judges.** If the presiding judge intends to have a panel of judges as alternates to ~~try the case set for~~ preside at trial or at any other hearing or proceeding in the case, a notice or amended notice of trial setting shall include a list of judges who may alternatively be assigned to so preside ~~at the trial~~ if the presiding judge is unavailable ~~to try the case~~. Upon service of the notice as to the panel, each party shall have the right to file one (1) motion for the disqualification without cause as to any ~~alternative~~ alternate judge or magistrate not later than fourteen (14) days after service of written notice listing the alternate judges or magistrates ~~who may preside at the trial of the case~~. Provided, if a party has previously exercised the right to disqualification without cause under this Rule 25(a), that party shall have no right to disqualify an alternate judge or magistrate under this subparagraph.

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4. That Rule 3 be, and the same is hereby, amended to read as follows:

Rule 33. Sentence and judgment.

***

(e). **Revocation of probation.** The court shall not revoke probation except after hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing. The court shall not revoke probation unless there is an admission by the defendant or a finding by the court, following a hearing, that the defendant willfully violated a condition of probation.

(f). **Waiver of fees and costs.**

(1) A person who has been sentenced by the court following a plea of guilty or finding of guilt may have his or her probation revoked or be found to be in contempt for failure to pay a fine, fee, or costs only if the court finds that the person has willfully refused to make such payment, or has failed to make sufficient bona fide efforts to legally acquire the resources to make such payment.

(2) A fee or cost imposed by statute on persons who plead guilty to or are found guilty of any offense may be waived in whole or part by the court only when there is a specific provision in statute allowing for the waiver of such fee or cost.

(3) A court may waive all or part of a fee or costs imposed by statute only upon making findings in writing or on the record that each statutory standard for the waiver of such fee or costs has been satisfied. If the court decides to waive such fee or costs in whole or in part, the court shall make such determination with regard to each offense on which the defendant is or has been sentenced, and shall determine whether such fee or costs shall be waived in whole or in part.

5. That Rule 41(a) be, and the same is hereby, amended to read as follows:

Rule 41. Search and seizure.

(a) **Authority to issue warrant.** A search warrant authorized by this rule or by the Idaho Code may be issued by a district judge or magistrate within the judicial district wherein the county of proper venue is located ~~property or person sought is located~~ upon request of a law enforcement officer or any attorney for the state of Idaho. Where it does not appear that the property or person sought is currently within the territorial boundaries of the state of Idaho, such warrant may still be issued; however, no such issuance will be deemed as granting authority to serve said warrant outside the territorial boundaries of the State.

***

6. That Rule 43 be, and the same is hereby, amended to read as follows:

Rule 43. Presence of the defendant.

(a) **Presence required.** The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) **Continued presence not required.** The further progress of the trial to and including the return of the verdict, or the progress of any other proceeding, shall not be prevented and the defendant shall be considered to have waived defendant's right to be present whenever a defendant, initially present:

(1) Is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), or

(2) Who has previously been warned by the court, acts in a manner so disorderly, disruptive and disrespectful as to substantially impede or makes impossible orderly conduct of the trial or other proceeding, and the court may:

***

7. That a Rule 54.1 be, and the same is hereby, amended to read as follows:

Rule 54.1 Appeals from a magistrate to a district court – Appealable judgments and orders.

***

(j) Any order granting or denying a motion to set aside the forfeiture of bail or to exonerate bail. An appeal from such an order shall not deprive the magistrate court of jurisdiction over other proceedings involving the case or stay such proceedings.

IT IS FURTHER ORDERED, that this order and these amendments shall be effective the first day of July, 2012.

IT IS FURTHER ORDERED, that the above designation of the striking of words from the Rules by lining through them, and the designation of the addition of new portions of the Rules by underlining such new portion is for the purposes of information only as amended, and NO OTHER AMENDMENTS ARE INTENDED. The lining through and underlining shall not be considered a part of the permanent Idaho Criminal Rules.

IT IS FURTHER ORDERED, that the Clerk of the Court shall cause notice of this Order to be published in one issue of *The Advocate*.

DATED this 9th day of February, 2012.

By Order of the Supreme Court

Roger S. Burdick
Chief Justice

ATTEST: Stephen Kenyon
Clerk

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court 2-13-12

STEPHEN W. KENYON Clerk

By: Kimber Graves Deputy